Supreme Court, U.S.
FILED
05-348 SEP 14 2005
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF
HER MINOR CHILD ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 14, 2005

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QUESTIONS PRESENTED FOR REVIEW

The City of Lynn, Massachusetts permits school choice within its public schools, but restricts participation on the basis of race. Under Lynn's plan, a transfer request will be denied if the transfer negatively affects the level of racial balance at the sending or receiving school. Racial balance is measured in terms of proportional representation to the system-wide minority student population. The only characteristic considered in granting or denying school choice requests is the race of the child. Lynn's plan does not include any individualized consideration.

The questions presented are:

1. Whether, in public elementary and secondary schools, achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments.

2. Whether a student assignment plan that mechanically and inflexibly restricts assignments based on the classifications "minority" and "non-minority" meets the Fourteenth Amendment's requirement of narrow tailoring.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following entities and individuals are parties to the action:

As petitioners: Samantha J. Comfort on behalf of her minor daughter Elizabeth Neumyer; Todd and Laurie Bollen on behalf of their minor son Matthew Bollen; Gina M. Leone on behalf of her minor son Troy J. LaMothe Jr.; Leanne Manuel on behalf of her minor daughter Shanice Manuel; Meta Stinson on behalf of her minor daughter Angelica Jackson; Karen Tsaltas on behalf of her minor son Michael A. Tsaltas.

The following parents were parties below, but are no longer parties in this matter: Rhonda Campbell, Karen Agnew, Andrew DiGaetano, Michael Stinson, Jean and William O'Neil, and Janeen Goodwin.

As respondents: The Lynn School Committee; the City of Lynn; Edward J. Clancy, as Mayor and Chairperson of the Lynn School Committee; the members of the Lynn School Committee: Patricia Capano, Donna M. Coppola, Arthur C. Fiste, John E. Ford, Jr., Jeffery T. Newhall, Daniel F. Cahill; Nicholas P. Kostan, as the Superintendent of the Lynn Public Schools; the Commonwealth of Massachusetts; the members of the Massachusetts Board of Education: James A. Peyser, J. Richard Crowley, Harneen Chernow, Judith I. Gill, Ann J. Reale, Roberta R. Schaefer, Abigail M. Thernstrom, and Henery M. Thomas, III.

The following office holders had been named as parties in their official capacities and were replaced by their successors in office as defendants: Charles D. Baker, Frank M. Carrabba, Patricia A. Crutchfield, Madelyn Day Barry, Edwin J. Delattre, Steven F. Duffy, William K. Irwin, Jr., George Mazareas, James Mazareas, William McDonald, Patrick J. McManus, Timothy McManus, Carolyn A. Murphy, Loretta Cuffe O'Donnell.

TABLE OF CONTENTS

Questions Presented for Review i
Parties to the Proceedings ii
Table of Authorities v
Opinions Below 1
Basis of Jurisdiction 1
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2
I. Background 2
II. How the Lynn Plan Works 4
Reasons for Granting the Writ 5
I. Introduction 5
II. Argument. 7
A. The Circuits are divided over whether the Equal Protection Clause permits the use of voluntarily-adopted racial restrictions in K-12 public school assignments 7
B. In its failure to apply this Court's decisions in comparable cases, the First Circuit cited an absence of any guidance from this Court in the specific area of voluntarily-adopted race-based student assignment plans. This Court should provide that guidance 10
C. The First Circuit approved racial diversity as a compelling interest despite its previous rejected by this Court 11
1. Racial diversity is not the same as viewpoint diversity 11
a. "True educational diversity" is based on improving academic discourse by ensuring a diversity

of views, and is not based on racial balancing 11

b. Measuring diversity by race does not advance the interest in the "expansive freedoms of speech and thought." 12

2. Racial balancing reinforces stereotypes, rather than disarming them 13

3. The interest adopted by the First Circuit is, in reality, one of addressing societal discrimination and providing role models – interests this Court has previously rejected 16

4. Racial balancing does not improve quality of education and should not be considered a compelling governmental interest 17

a. The findings by Lynn's own experts belie the contention that racial balancing is the cause of improvements within Lynn's schools 17

b. Theories, not findings 17

c. Lynn's schools will be diverse without the Plan's racial restrictions 18

D. The Lynn Plan is not narrowly tailored 19

1. The Lynn Plan uses a non-remedial quota 19

a. Lynn's use of race is not remedial 19

b. The racial restrictions of the Plan constitute a quota 19

c. This Court has limited racial balancing to the remedial context,

yet the First Circuit has permitted its non-remedial use 20

2. Lynn's appeal process demonstrates that the Plan also constitutes a dual assignment process 21
3. The Lynn Plan is mechanically-applied and lacks individualized consideration 22
4. Maintaining racial diversity is not a narrowly tailored means of disarming racial stereotypes 23
5. The Lynn Plan is not calibrated to achieve Lynn's purported interest 26
6. Lynn failed to exhaust race-neutral alternatives 28
7. Lynn's Plan is unlimited in its duration .. 28

Conclusion 29

TABLE OF AUTHORITIES

CASES

Anderson v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004) 28

Brewer v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000) 9

Brown v. *Brd. of Education*, 347 U.S. 483 (1952) 5, 13

Cavalier v. *Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005) 7, 8, 18, 21

City of Richmond v. *Croson*, 488 U.S. 469 (1989) 14, 16, 18

Doe v. *Kamehameha Schools*, 416 F.3d 1029 (9th Cir. 2005) 8, 15

Edmonson v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) 12

Eisenberg v. *Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) 7
Freeman v. *Pitts*, 503 U.S. 467 (1992) 18, 21
Gratz v. *Bollinger*, 539 U.S. 244 (2003) 4, 10, 21
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 4, 10, 11, 12, 19, 22, 23, 27
Holland v. *Illinois*, 493 U.S. 474 (1990) 12
Johnson v. *California*, 545 U.S. __, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) 14
McFarland v. *Jefferson Cty. Pub. Schs.*, 330 F.Supp.2d 834 (W.D. Ky. 2004) 9, 19, 20
McFarland v. *Jefferson Cty. Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005) 8
National Soc'y of Professional Eng'r, Inc. v. *United States*, 435 U.S. 679 (1978) 20
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 14
Parents Involved in Community Schools v. *Seattle School Dist. No. 1*, 377 F.3d 949 (9th Cir. 2004), *petition for rehr'g en banc granted*, 395 F.3d 1168 (9th Cir. 2004) 8, 12, 24, 25
Pasadena Bd. of Educ. v. *Spangler*, 427 U.S. 424 (1976) 20
Regents of University of California v. *Bakke*, 438 U.S. 265 (1978) 11, 12, 19, 22
Shaw v. *Hunt*, 517 U.S. 899 (1996) 16, 28
Shaw v. *Reno*, 509 U.S. 630 (1993) 12, 13
Smith v. *Univ. of Washington*, 392 F.3d 367 (9th Cir. 2004) 8, 18, 25
Tuttle v. *Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999) *cert. dismissed*, 529 U.S. 1050 (2000) 7, 15, 24, 25
Watson v. *Memphis*, 373 U.S. 526 (1963) 14
Wygant v. *Jackson Bd. of Education*, 476 U.S. 267 (1986) 6

STATUTES

28 U.S.C. §1254 1
28 U.S.C. §1331 3
28 U.S.C. §1343 3
42 U.S.C. §1981 ..... 2, 8
42 U.S.C. §1983 ..... 2, 3
42 U.S.C. §1985 2
42 U.S.C. §1986 2
42 U.S.C. §2000d 2

OTHER AUTHORITIES

ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, U.S. Dept. of Ed., February, 2004, http://www.ed.gov/about/offices/list/ocr/raceneutral.html 28

CONSTITUTIONAL PROVISIONS

Constitution of the United States, First Amendment 11, 12
Constitution of the United States, Fourteenth Amendment 2, 3, 5, 7, 21

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Samantha J. Comfort, on behalf of her minor child Elizabeth Neumyer, *et al*, respectfully pray that a *Writ of Certiorari* issue to review the decision entered by the United States Court of Appeals for the First Circuit, dated June 16, 2005 (App.1 – 50).

OPINIONS BELOW

The opinion of the *En Banc* Panel of the United States Court of Appeals for the First Circuit (App.1 - 50) is reported at 418 F.3d 1 (1st Cir. 2005). The opinion of the Panel of the First Circuit (App.51 - 90) was reported at 2004 WL 2348505, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004) and was withdrawn by 2004 U.S. App. LEXIS 24662 (App.96-97). The Decision of the District Court (App.98 - 220) is reported at 283 F.Supp.2d 328, 182 Ed. Law Rep. 156 (D.Mass. 2003).

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States reads in relevant part, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The relevant provisions of 42 U.S.C. §§1981, 1983, 1985, 1986, 2000d and the Massachusetts Racial Imbalance Law are reproduced beginning at App.221.

STATEMENT OF THE CASE

I. Background

This case concerns the race-based student assignment plan used by the City of Lynn, Massachusetts. Lynn's public schools permit public school choice, but restrict transfers based on race. Some of the public schools in Lynn do not accept transfers from children who are African-American, Asian or Hispanic. Other schools do not accept transfers from children who are white. The petitioners are a multi-ethnic group of parents from Lynn who challenged the constitutionality of this process.

Naturally occurring housing patterns have resulted in parts of Lynn being predominately white, while other parts of the city are predominantly Asian, Hispanic or African-American. App.6. These housing patterns are typical of cities across America and are nct the result of any action by the City of Lynn. App.45. In other words, Lynn's neighborhoods are *de facto* segregated.

These housing patterns would result in some of Lynn's schools being predominantly white, while other schools would be predominately Asian, Hispanic or African-American. Given that Lynn had a student population that was 58% minority at the time of trial, all of Lynn's schools would have a significant number of minority and non-minority students regardless of the assignment plan used, but each school would not mirror the minority percentage of the system as a whole.

Instead, Lynn's schools would look like the City of Lynn – they would reflect the community's housing patterns. App.45 (Lynn's goal is to prevent "the housing pattern of *de facto* segregation [from being] projected into the school system" (Boudin, C.J., concurring)).

Under the Massachusetts Racial Imbalance Law, communities like Lynn can receive additional state education aid if they adopt student assignment plans that seek to racially balance their schools. *See* Statutory Addendum, App. 222. In 1989, Lynn implemented its *Voluntary Plan for School Improvement and the Elimination of Minority Isolation* in order to qualify for these funds. Lynn is one of twenty-two communities in Massachusetts that have plans adopted under the Racial Imbalance Law.

Even with Lynn's race-based plan, its schools vary widely in their racial composition. At the time of trial, Lynn's schools ranged from 25% to 84% minority. Despite this varying levels of racial diversity, Lynn's schools are equal in quality. The parties stipulated that, at the time of trial, each of Lynn's schools was "comparable in quality, resources, and curriculum." App.6, n. 1. Lynn's own experts found that Lynn's schools were "uniformly positive" in the education and social development they provided. App. 142.

A multi-ethnic group of parents from Lynn challenged Lynn's use of racial restrictions on its school choice program. The first group of parents brought suit in August of 1999 – the *Comfort* plaintiffs. They were joined by a second multi-ethnic group of parents in February of 2001 – the *Bollen* plaintiffs. The *Comfort* and *Bollen* plaintiffs challenge Lynn's use of racial restrictions within the Lynn Plan as violating their children's rights under the Equal Protection Clause and various civil rights statutes. The jurisdiction of the district court was invoked under 42 U.S.C. §1983 and 28 U.S.C. §§1331 (federal question) and 1343 (deprivation of civil right).

Following a trial, the District Court found for the Lynn School Committee and the Commonwealth of Massachusetts, finding racial diversity to be a compelling governmental interest. App.98-220. A Panel of the First Circuit unanimously reversed, finding Lynn's Plan unconstitutional because it failed the requirements of narrow tailoring. App.78.

A sharply divided *En Banc* Panel then upheld Lynn's use of racial restrictions. In doing so, the *En Banc* Panel carved out an exception to the generally disfavored treatment given to discriminatory student assignment plans. The majority held that discriminatory assignment plans are constitutionally permitted if they are adopted to address *de facto* segregation. App.45. The majority concluded that racial diversity is a compelling governmental interest under this Court's recent decision in *Grutter* v. *Bollinger*, 539 U.S. 306, 316 (2003). App.21. The majority went on to hold that the narrow tailoring requirements of *Grutter* are not applicable to racial diversity plans. App.25. The dissenters noted that the Lynn Plan fails the narrow tailoring prong of strict scrutiny as most recently articulated in *Grutter* and in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). App.48-49.

II. How the Lynn Plan Works

Under Lynn's student assignment plan, each child is guaranteed an assignment to their neighborhood school, called their "district school." The Plan permits school choice. In order to encourage parents to select schools other than their district school, each school has a unique theme. App.49. Parents are also enticed into selecting out-of-district schools because some of these schools "are located near after-school programs or near high-employment areas." *Id.* When a parent wishes to participate in this school choice program, race limits the schools available to their child. App.7-8. The goal of the Plan is to move all schools towards "racial balance," which is measured in terms of "minority" and "non-

minority." *Id.* Transfer requests are denied if they would negatively affect the racial balance at either the sending or receiving school. A racial balanced school is defined as an elementary schools that is within +/-15% of the system-wide minority student population or a high school or middle school that is within +/-10% of the system-wide minority student population. App.7.

REASONS FOR GRANTING THE WRIT

I. Introduction

The decision of the First Circuit represents a radical shift in the limits on the use of racial classifications. School systems across the country are under increasing pressure to racially balance their schools. Under the First Circuit's decision, public schools are free to assign children on the basis of skin color for no other reason than the mistaken and unsupported belief that good education requires a specific racial makeup in the classroom. In order to permit this unfettered use of race in school assignments, the First Circuit has eliminated the usual barriers to government choosing between its citizens on the basis of their race, when done in the name of racial diversity. App. 25-26. This permissive use of race, dooms generations of children to the damaging experience of being turned away at the school house door for having the wrong skin color.

This case raises the question of what limits the Equal Protection Clause of the Fourteenth Amendment places on voluntarily-adopted race-based student assignment plans in the public school setting. As noted by the First Circuit, this Court has not previously addressed voluntarily-adopted race-based student assignment plans that seek to maintain racial balance/racial diversity. App.23. This Court has addressed the use of voluntarily-adopted race-based student assignment plans that create *de jure* segregated schools, *see e.g. Brown* v. *Brd. of Education*, 347 U.S. 483, 493 (1952), but the question of whether *de jure* discriminatory assignment plans can be

used to address *de facto* segregation within public school systems has not been answered by this Court. The Circuit Courts that have considered the issue are divided.

Under the rubric adopted by the First Circuit, public schools are free to utilize non-remedial race-based student assignment plans that use mechanically-applied quotas in order to maintain racial balance (*i.e.* racial diversity). The Lynn Plan uses *de jure* discrimination in student assignments in an effort to address *de facto* segregation in housing patterns. In doing so, the Plan does not provide for any individualized consideration of how a child will contribute, or not contribute, towards "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society" – the purported objectives of the Plan. App.19.

This decision is in direct conflict with decisions of other Circuits that have rejected the use of non-remedial race-based school assignment plans designed to maintain racial diversity. Even the Circuit Court judges who reviewed the Lynn Plan are sharply divided. Out of the six appeals court judges to review the Lynn Plan, three have found it unconstitutional, while the other three have found it to be constitutionally permitted.[1]

An additional ground for review by this Court is the failure of the three judge majority of the *En Banc* Panel to follow the standard applied by this Court in similar cases. In its holding that the normal narrow tailoring standard is not applicable where the government's purpose is maintaining racial diversity in public schools (App.25), the *En Banc* Panel relied on the lack of direct guidance from this Court.

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[1] The three judges who made up the original Panel of the First Circuit, Judges Selya and Howard of the First Circuit and Judge Dyk of the Federal Circuit, unanimously found the Lynn Plan unconstitutional. The *En Banc* Panel included judges Selya and Howard, who continued to find the Plan constitutionally infirmed and Judges Boudin, Torruella and Lipez, who found the Plan constitutional.

> [W]e are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent . . . The Supreme Court has not passed upon a plan anything like the one before us. That Court is free to extend its precedents to the present context, but that is its role--not ours.

App.45 (Boudin, CJ., concurring). This Court should provide that guidance.

II. Argument.

A. The Circuits are divided over whether the Equal Protection Clause permits the use of voluntarily-adopted racial restrictions in K-12 public school assignments.

The decision of the First Circuit directly conflicts with decisions of the Fourth, Fifth and Ninth Circuits concerning voluntarily-adopted race-based student assignment plans designed to advance racial diversity.

The Fourth Circuit examined two such plans in *Tuttle* v. *Arlington County School Board*, 195 F.3d 698, 700 (4th Cir. 1999) *cert. dismissed*, 529 U.S. 1050 (2000) and *Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123, 126-27 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000). That Court concluded that because both assignment plans inflexibly used racial balancing in an effort to achieve the purported educational benefits of racial diversity, they violated the Equal Protection Clause. *Tuttle*, 195 F.3d at 705-07; *Eisenberg*, 197 F.3d at 133. In reviewing the plans at issue in *Tuttle* and *Eisenberg*, the Fourth Circuit reached conclusions about the appropriate narrow tailoring standard that directly conflict with the standard applied by the First Circuit. These conflicts are analyzed in turn within the review of the various elements of strict scrutiny *supra*.

More recently, the Fifth Circuit addressed the appropriate narrow tailoring standard for race-based K-12 assignment plans in *Cavalier* v. *Caddo Parish School*

Board, 403 F.3d 246 (5th Cir. 2005). Unlike the First Circuit, the Fifth Circuit concluded that racial balancing plans are not narrowly tailored. *Id.* at 260.

In 2004, the Ninth Circuit addressed an assignment plan similar in many respects to Lynn's. Reviewing a grant of summary judgment for the defendants, a panel of the Ninth Circuit found the Seattle plan insufficiently narrowly tailored based on the requirements spelled out by this Court in *Gratz* and *Grutter*, a standard specifically rejected by the First Circuit's *En Banc* Panel. App.25. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 377 F.3d 949 (9th Cir. 2004) ("*PIICS*"). A petition for rehearing *en banc* was granted in the *PIICS* case, 395 F.3d 1168 (9th Cir. 2004), and an *En Banc* Panel of the Ninth Circuit heard arguments on June 21, 2005.

The Ninth Circuit also addressed many of the narrow tailoring questions at issue in this case in *Smith* v. *Univ. of Washington*, 392 F.3d 367 (9th Cir. 2004), *petition for cert. filed* (Apr. 18, 2005), which addresses the use of race as a factor in a Law School admission policy. The Ninth Circuit found the admission plan constitutional specifically because it satisfies narrow tailoring requirements, which the Lynn Plan does not. These include: individualized consideration and the lack of specific numerical targets in the Law School's Plan.

The Ninth Circuit has also recently rejected the use of a race-based admission policy at a private school under 42 U.S.C. §1981. *Doe* v. *Kamehameha Schools*, 416 F.3d 1029 (9th Cir. 2005). The Ninth Circuit adopted a standard based on Title VII for its §1981 analysis and found against the mechanical inflexible use of race even under that lower standard.

In *McFarland* v. *Jefferson County Brd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), the Sixth Circuit addressed the constitutionality of two separate assignment processes used by public schools in Louisville, Kentucky. In a brief *per curiam* opinion, the Sixth Circuit adopted the District

Court's findings that one of the two assignment plans was constitutional and the other was not. Some of the characteristics that rendered the second plan unconstitutional can be found in the Lynn Plan, which include race being the determinative factor, rather than a mere "tipping" factor and the lack of individualized examination. *McFarland* v. *Jefferson Cty. Pub. Schs.*, 330 F.Supp.2d 834, 862-63 (W.D. Ky. 2004).[2]

In *Brewer* v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000), the Second Circuit reviewed an order granting a preliminary injunction. The District Court had granted the injunction based on its conclusion that racial diversity could never be a compelling interest. *Id.* at 747. The Second Circuit reversed, holding "we do not think that we can conclude 'clearly'--the plaintiffs' burden in this case--that reduction of racial isolation to ameliorate what may be *de facto* segregation in the voluntarily participating public schools is not a compelling state interest" (*Id.* at 752) and remanded the case for a determination of whether such a plan could meet the requirements of narrow tailoring. *Id.* at 753. The case settled before further proceedings could take place.

The Fourth, Fifth and Ninth Circuits have each found the use of racial balancing assignment plans similar to Lynn's unconstitutional. *Tuttle*, *Eisenberg*, *Cavalier*, *PIICS* and *Kamehameha Schools*. The First Circuit, and to a limited extent, the Second and Sixth Circuits, have upheld the use of racial balancing assignment plans. *Comfort*, *Brewer* and *McFarland*.

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[2] In fact, the individual examination contained within the Louisville assignment plan upheld by the Sixth Circuit lacks any meaningful flexibility or individualized consideration. *See*, *McFarland*, 330 F.Supp.2d at 842 ("the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%"). The plan upheld in *McFarland* could not survive the narrow tailoring analysis of *Grutter*.

B. In its failure to apply this Court's decisions in comparable cases, the First Circuit cited an absence of any guidance from this Court in the specific area of voluntarily-adopted race-based student assignment plans. This Court should provide that guidance.

The First Circuit approved the very practices rejected by this Court in *Gratz* and *Grutter* – the use of inflexible, mechanically-applied quotas to achieve diversity measured by race alone. *Grutter*, 539 U.S. at 316 ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'") and *Gratz*, 539 U.S. at 270 (a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity").

The *En Banc* Panel attempts to justify its decision to disregard this Court's recent *Gratz* and *Grutter* decisions by finding that, "[t]he Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed." App.43 (Boudin, C.J., concurring). But as the dissenters correctly noted, "[t]he majority accentuates those idiosyncracies [of this case], but chooses to overlook the elephant in the room: the fact that this case arises against a backdrop of Supreme Court jurisprudence, recently revisited in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), that must guide our decision." App.46. The dissenters continued "[t]he majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens." *Id.*

C. The First Circuit approved racial diversity as a compelling interest despite its previous rejection by this Court.

1. Racial diversity is not the same as viewpoint diversity.

a. *"True educational diversity" is based on improving academic discourse by ensuring a diversity of views, and is not based on racial balancing.* Despite conclusions to the contrary by the *En Banc* Panel, the governmental interest at issue in *Grutter* is not the same or a related interest to the one offered by Lynn. *Compare, Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional") with App.25 ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race"). The justification for racial diversity as a compelling interest cannot be found in *Grutter*. The interst in multifaceted "true education diversity" accepted as compelling in *Grutter* is rooted in the First rather than the Fourteenth Amendment. *Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"), *citing Regents of University of California* v. *Bakke*, 438 U.S. 265, 312 (1978). True educational diversity is an interest in academic discourse between students who contribute diverse experiences and viewpoints, not one of racial balancing.[3]

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[3] Although the interest adopted as compelling by the First Circuit is not the viewpoint diversity addressed in *Gratz* and *Grutter*, given the different roles played by public K-12 educational institutions that of colleges and universities, the underlying principle of ensuring free academic discourse among mature college-aged students based on their varied life experiences is not found among young children with

b. *Measuring diversity by race does not advance the interest in the "expansive freedoms of speech and thought."* Defining diversity by race is destructive of the benefits of viewpoint diversity and academic discourse sought through true educational diversity.

> It is not an interest in simple ethnic diversity . . . diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Bakke, 438 U.S. at 315 (Powell, J.) (emphasis in original).

Attempting to utilize racial diversity as a tool to advance "the robust exchange of ideas" assumes that all blacks think alike, or worse, in this case it assumes that all "minorities" think alike or will all contribute to a classroom in the same way. *See Shaw* v. *Reno*, 509 U.S. 630, 15 (1993) ("the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls [amounts to impermissible racial stereotypes]"), *citing, Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury") and *Holland* v. *Illinois*, 493 U.S. 474, 484, n.2 (1990). The *Shaw* Court went on to note that

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limited life experiences in the K-12 setting. Therefore, the educational diversity interest rooted in the First Amendment as adopted in *Grutter* should not justify the denial of public K-12 assignments based on skin color. *Grutter*, 539 U.S. at 329 (noting universities' special First Amendment niche). *See also*, *PIICS*, 377 F.3d at 981-82.

policies, which perpetuate such stereotypes, run the risk of exasperating the racial divisions within our society. *Shaw* v. *Reno*, 509 U.S. at 16.

Put simply, defining diversity by race relies on stereotypes. It assumes based on the broad and ill-defined classifications of "minority" and "non-minority" that a child will contribute in a certain way, without any examination of the individual child. For example, a recent Cambodian immigrant, who would be classified simply as a "minority," would be denied an assignment to a school that is populated predominately by native-born minority students, regardless of the individual contribution the recent immigrant could bring to "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society." App.19.

2. Racial balancing reinforces stereotypes, rather than disarming them.

The Lynn Plan inflicts the same harm always inflicted by government when it distinguishes between its citizens based on nothing more than the color of their skin. Even though this country just celebrated the 50th anniversary of *Brown* v. *Brd. of Educ.*, if Linda Brown were a child living in Lynn today, she could still be turned away at the schoolhouse door for being black.

The dissenters noted the harm caused by the Plan:

> [T]he Lynn Plan inflicts [stigmatic harm] upon a number of students seeking to benefit from a program that Lynn knows is appealing without regard to racial reasons. To illustrate, consider that the Plan can succeed only if the opportunity to transfer to a distant school is attractive to parents. It is conceivable that some parents would transfer a child out of a desire to have the child learn in a more integrated environment. But the Lynn Plan actively creates and exploits other methods of benign coercion in search of its

> goal. For instance, Lynn admits that a major function of its 'theme' schools is to entice parents to transfer their children. Another method is selling convenience to parents. School officials are aware that some of schools are located near after-school programs or near high-employment areas. Every student, of every race, in every school zone, has some potential benefit – yet the school committee's policy evaluates whether students may take part in the transfer program based solely on the color of a student's skin.

En Banc Opinion, App.48-49 (Selya, J., dissenting).

As this Court has previously noted, "the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension." *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Recently this Court again recognized the harm caused when government uses race to distinguish between individuals. "[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility' . . . By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'" *Johnson* v. *California*, 545 U.S. __, 125 S.Ct. 1141, 1147, 160 L.Ed.2d 949, 955 (2005) (emphasis in original).

The First Circuit suggests that Lynn's racial restrictions may prevent racial hostility. But, as noted by this Court, racial stereotypes usually underlie the belief that racial hostility can be cured through using racial classifications. *See Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns"); *Watson* v. *Memphis*, 373 U.S. 526, 536 (1963) ("neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

Unlike the First Circuit, the Fourth Circuit found that plans like Lynn's do inflict harm on the children who are denied assignments. "We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups." *Tuttle*, 195 F.3d at 707. The Ninth Circuit has recently agreed that race based school admissions policies reinforce racial stereotypes. *Kamehameha Schools*, 416 F.3d at 1042.

As noted by the dissenting judges below:

> In one sense, then, this plan is even more harmful than the racially inflexible program struck down in *Gratz*. There, prospective non-minority students could be admitted by the terms of the policy itself and thus those who were rejected could look to something other than race as a reason for their failure.

App.49 (Selya, J., dissenting). Under the Lynn Plan, race is the sole determinative factor. App.7-8. When a child sees a neighbor being admitted to a school to which they are denied access, there is no doubt that race is the reason. Or, as occurred with one pair of sisters of biracial parents in this case, when one sister (who was listed in school records as white) was permitted a transfer, but the other sister (who was listed as black) was not; there could be no doubt in the mind of these two girls that race makes all the difference as to how they will be treated.

As a result of this incident with former Plaintiffs Keana and Kearra, Lynn amended the Plan to permit parents of biracial children to switch their racial designation, making those children eligible to attend any school. This is why the First Circuit found, "[a]ny student who qualifies as 'multi-racial' is not subject to the race-conscious transfer limits." App.8, n.4. This change only emphasizes the Plan's arbitrary nature. Children classified as "non-minority" have one set of schools available to them. Children classified as "minority" have

a separate set of schools to choose from. While children who happen to have biracial parents are exempt from the racial barriers and can choose any school.

This use of *de jure* discrimination against school children as a means of addressing naturally occurring (*de facto*) housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual characteristic and that traits can be attributed to an individual based on nothing more than the color of that person's skin.

3. The interest adopted by the First Circuit is, in reality, one of addressing societal discrimination and providing role models – interests this Court has previously rejected.

Lynn argues that its Plan is necessary to "disarm racial stereotypes." App.19. Lynn's own experts testified that the sterotyping the Plan purports to cure is a "normal process" in childhood development. *Trial Transcript*, Day 10, 29:14–24. This Court has specifically rejected efforts to cure societal discrimination as a justification for racial classifications. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest" *Shaw* v. *Hunt*, 517 U.S. 899, 910 (1996). *See also, Croson*, 488 U.S. at 497 (Societal discrimination and providing role models are not compelling governmental interests).

Essentially, the First Circuit has held that children need a certain number of other children from their own race (here defined simply as minorities and non-minorities) in order to effectively learn. The argument that children need a critical mass of other children from the same racial classification strikes too closely to the role model justification rejected in *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 274-76 (1986) (the supposed

benefits to minority students of having minority teachers cannot justify the use of a racial classification).

4. Racial balancing does not improve quality of education and should not be considered a compelling governmental interest.

a. *The findings by Lynn's own experts belie the contention that racial balancing is the cause of improvements within Lynn's schools.* Lynn's experts found that all of Lynn's schools were doing an equal job of socializing and educating their students.

> I think what's important is that in looking at these different schools I looked to see what the environment was like. And it was uniformly positive, which was what was very impressive about it. So, it wasn't the case that one school really stood out as being, you know, seriously troubled, tough, problematic.

Trial Transcript, Day 8, 121:25 – 122:16; App. 142.

This finding by Lynn's own experts demonstrates that the level of racial diversity at Lynn's schools (ranging from 25% to 84% minority at time of trial) has no impact on the quality of socialization or education provided. We must look to other race neutral factors within the Lynn Plan, as well as at statewide educational reforms and changes in society at large, for the source of the improvements that occurred equally at Lynn's predominantly minority ("racially isolated") schools, at its predominately non-minority ("racially imbalanced") schools and at its racially balanced schools.

b. *Theories, not findings.* Although Lynn's experts found that Lynn's schools with higher levels of racial diversity were ***not*** superior to its schools with lower levels of racial diversity, they went on to discuss "theories" put forward by some authors, who hypothesize that as schools become more racially diverse they become better schools. But, the findings of Lynn's own experts were that these "theories" have not proven true in Lynn.

Instead, Lynn's experts found that Lynn's schools are "uniformly positive" in quality, regardless of their racial composition. App.142.

If the "theory" on which the *En Banc* Panel relied had any validity, Lynn's schools that were more racially diverse (*i.e.* Fallon at 48% or Callahan at 56% minority) would be superior to schools like Lynn Woods at 25%, Sisson at 27% or Harrington at 84% minority respectively. But instead, Lynn's own experts found that all of these schools are doing an equal job. App.142.

The *En Banc* Panel relied on a mere "theory" discussed by Lynn's experts, rather than those experts' findings that Lynn's more racially diverse schools are not doing a better job of educating and socializing Lynn's students in concluding that racial balancing is a compelling interest. App.19.

c. *Lynn's schools will be diverse without the Plan's racial restrictions*. In a school system with a student population that is 58% "minority," virtually any assignment plan would result in schools that are far more ethnically diverse than the majority of school schools across America. Lynn seeks to shift the already diverse population of its schools in order to meet a specific numerical goal – racial proportionality.

To the extent that the First Circuit found that specific percentages are required, this decision conflicts with the findings of Lynn's own experts and with recent decisions of the Fifth and Ninth Circuits. "[D]efining critical mass in terms of specific percentages 'would amount to outright racial balancing, which is patently unconstitutional.'" *Smith*, 392 F.3d at 379. "[A] quota system 'cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing, and '[r]acial balance is not to be achieved for its own sake.' *Cavalier*, 403 F.3d at 260, *quoting Croson*, 488 U.S. at 508 and *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992).

D. The Lynn Plan is not narrowly tailored.

In addition to the failure to establish a compelling interest justifying Lynn's discrimination on the basis of race, the Lynn Plan also lacks any of the indicia of narrow tailoring.

1. The Lynn Plan uses a non-remedial quota.

a. *Lynn's use of race is not remedial*. As the *En Banc* Panel acknowledged, "[t]his is not a case where the racial classification is aimed at remedying past segregation." App. 18. The parties stipulated that, "the education provided to Lynn's regular education students in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum, even though schools do offer and provide varying academic programs."

b. *The racial restrictions of the Plan constitute a quota*. This Court recently defined what constitutes a quota: "To be narrowly tailored, a race-conscious admissions program cannot use a quota system --it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334, *quoting Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

Under the Lynn Plan, children are denied transfers for one reason only – their race. App.8. At each of Lynn's schools, children are insulated from competition with other transfer applicants who belong to the disfavored race for that school. App.7-8. This is done to achieve proportional representation with the system's racial makeup, defined as +/- 10 or 15% of the system's minority student population. App. 7. The Lynn Plan is not merely race preferential; it bars members of the race disfavored for a particular school from seeking an assignment to that school.

This Court recent rejected the use of quotas in non-remedial settings. *Grutter*, 539 U.S. at 334. Despite this, the First Circuit found the use of non-remedial quotas to

be an acceptable means of preserving a "critical mass" of minority and non-minority students. *Contra McFarland*, 330 F.Supp.2d at 862 (rejecting assignment plan that place children on separate assignment lists).[4]

c. *This Court has limited racial balancing to the remedial context, yet the First Circuit has permitted its non-remedial use*. This Court has held that Courts exercising their remedial power to make whole an injured party may impose remedies that would be unconstitutional if adopted voluntarily in a non-remedial setting. *See e.g., National Soc'y of Professional Eng'r, Inc.* v. *United States*, 435 U.S. 679 (1978) (court may impose remedy that would otherwise violate First Amendment freedom of speech if imposed under other circumstances). Given this broad remedial power, this Court has permitted the limited use of racial balancing as a remedial tool. But even when utilized in this remedial role, the Court has shown disfavor for racial balancing. In *Pasadena Bd. of Educ.* v. *Spangler*, this Court held that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools. 427 U.S. 424, 433-34 (1976) ("'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school

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[4] While the Sixth Circuit permitted the use of race in one of Louisville's assignment plans, the Lynn plan is more similar to the assignment plan rejected by the Sixth Circuit in *McFarland* – the "tradition school assignment process." The characteristics that distinguished the plan held unconstitutional from the plan upheld by the Sixth Circuit is that in the "traditional school" plan, race predominates over all other factors. In the "2001 plan," upheld by the Sixth Circuit, race is described as merely a "tipping" factor. In Lynn, race is the only consideration. App.8. There is no competition for seats, no random ranking by lottery, and residence is not a factor in transfer requests. These factors were key in the decision to uphold the "2001 plan" but not the "traditional school" plan. 330 F.Supp.2d at 862-63 ("in the 2001 Plan, the racial guidelines play a muted role in the assignment process along with other factors, such as residence, program capacity and, sometimes, placement in a lottery").

system"). Again, in *Freeman*, this Court held that courts are prohibited by the Equal Protection Clause from adopting limitless racial balancing. 503 U.S. at 494.

Racial balancing is only permitted for use in remedying lingering effects of discrimination. Once those lingering effects have been cured, the racial balancing must stop. The First Circuit permits this use of perpetual racial balancing for a non-remedial purpose. *Contra*, *Cavalier*, 403 F.3d at 260 (rejected perpetual racial balancing, even when cast as a remedial policy).

2. Lynn's appeal process demonstrates that the Plan also constitutes a dual assignment process.

The undergraduate program struck down in *Gratz* contained exceptions that the university argued were evidence of flexibility. This Court disagreed. *Gratz*, 539 U.S. at 274 ("We think that the flagging program only emphasizes the flaws of the University's system as a whole"). This Court explained that while it was possible for a non-minority student to be admitted based on the exceptions contained in the undergraduate admissions plan, the need for students to undergo such a process, while competing for seats with students of other races who did not, is proof of the discriminatory effect. "[T]his individualized review is only provided *after* admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant." *Id.*

The Lynn Plan similarly offers exceptions. Parents can petition the Superintendent for a hardship exception. Children who are judged by Lynn to be the "right" race for that a particular school, do not need to go through this process. *See*, App.50 (Selya, J., Dissenting). The appeal process subjects children of the disfavored race to a separate assignment process – the hallmark of an illegal dual assignment system. In a perverse twist on the

accepted principles of Equal Protection jurisprudence, under the Lynn Plan, assignment requests can be denied because the parent fails to present a compelling need for race not to be a deciding factor.

3. The Lynn Plan is mechanically-applied and lacks individualized consideration.

Even where a compelling interest justifying the use of a racial classification is established, the permissible reach of such classifications is extremely limited. This Court observed in *Grutter* that "the hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334. The First Circuit declined to apply these hallmarks of a narrow tailoring. App.25 ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race").

Unlike the three judges that made up the majority of the *En Banc* Panel, the three judges of the original Panel applied the narrow tailoring standard as articulated by this Court:

> The Lynn Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to diversity . . . the Lynn Plan is even more mechanical and even less flexible than the collegiate admissions policy that the *Gratz* Court found wanting.

Panel Opinion, App.78 (internal citation and footnote omitted). *See also*, *Grutter*, 539 U.S. at 337 ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount"); *Bakke*, 438 U.S. at n.52 ("The denial to

respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program" (Powel, J.)).[5]

4. Maintaining racial diversity is not a narrowly tailored means of disarming racial stereotypes.

In their decision, the majority of the *En Banc* Panel held that this Court's admonition against the use of mechanically-applied racial classifications that lack individualized consideration was not applicable to the racial diversity objective of the Lynn Plan. App.25. But, as the *En Banc* Panel acknowledged, Lynn's ultimate objective could not be racial diversity by itself. App.18-19. *See Grutter*, 539 U.S. at 329-30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional").

Because racial diversity cannot be the goal in itself, the *En Banc* Panel stated the interests of the Plan as "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an

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[5] The majority on the *En Banc* Panel had to reach the conclusion that individualized consideration is not required here because, as noted by the dissenters below, Lynn already has the mechanism in place for such individualized consideration but has chosen not to use it,

> Lynn hardly can be heard to complain that such [individualized consideration] is unworkable. By its own admission, it already allows more than half of the students denied transfers under its race-based policy to have an exemption for non-race-related reasons. These transfers have not undermined the benefits of diversity in the school community. The city persists, however, in subjecting all the students who request transfers to what is in effect a two-tier process – one in which the student is evaluated solely on the basis of color and a second in which a rejected student must convince the school that his or her color should not matter.

En Banc Opinion, App.50 (Selya, J., dissenting).

increasingly multi-racial society." App.19. If these objectives are the governmental interest sought by the Plan, then the appropriate question the Circuit should have answered is: Is the maintenance of some minimum level of racial diversity (*i.e.* racial balancing) a narrowly tailored means of achieving the sought after educational improvements? Or, put more precisely to the facts of this case: Is maintaining proportional representation, measured in terms of +/-10 or 15% of the system-wide minority student population, a narrowly tailored means of "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society"?

Had the First Circuit properly viewed racial diversity as the means offered to achieve the end, rather than the end itself, it could not have reached the conclusion that the purely racial nature of the governmental interest eliminates the need for individualized consideration. App.25 ("The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (*e.g.*, the *Gratz* and *Grutter* policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity"). The First Circuit's reasoning is in direct conflict with the Fourth Circuit, which properly held that maintaining racial balance is not a narrowly tailored means of achieving the educational objectives offered as the ultimate goal of the *Tuttle* Plan, the same educational objectives put forward by Lynn. *Tuttle*, 195 F.3d at 707. *See also*, *PIICS*, 377 F.3d at 696 (finding lack of sufficient narrow tailoring where assignment policy seeking racial diversity was not flexible and lacked individualized consideration).

If the objective were educational improvement rather than naked racial balancing, an individualized examination of each student's potential contribution towards achieving that educational objective would be necessary in order to ensure the Plan is applied in a

flexible manner, and to ensure that the impact of the racial barrier is limited only to children whose assignment requests would truly advance or hinder that objective. Discussing the individualized consideration requirement, the Ninth Circuit recently held, "[t]he Supreme Court concluded that [the *Grutter*] program did not unduly harm members of any racial group because it considered 'all pertinent elements of diversity' and thus 'can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.'" *Smith*, 392 F.3d at 374. This willingness to select applicants who do not belong to the favored racial group, but who would make meaningful contributions towards the purported educational objectives is the hallmark of flexible application.[6]

The conclusion of the three judges of the *En Banc* Panel that the individualized consideration requirement of narrow tailoring is not applicable to assignment plans that have as their objective racial diversity (App.25), is in direct conflict with decision of the Fourth and Ninth Circuits. *Tuttle*, 195 F.3d at 707 (finding that the assignment plan failed narrow tailoring because, among other defects, there was no individualized consideration); *PIICS*, 377 F.3d 976 (rejecting argument that

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[6] In *Smith*, the Ninth Circuit noted one tool for ensuring a flexible application of diversity plans, which is not utilized by Lynn. Rather than relying on mere racial stereotypes to determining what contribution an applicant may make towards achieving its educational objectives, the University of Washington Law School sought statements from applicants explaining how they would improve diversity. *Smith*, 392 F.3d at 377 ("the Law School used the letter to more narrowly tailor the awarding of a plus for an applicant's race or ethnicity by seeking more information about the role that race or ethnicity played in the applicant's life, rather than simply relying on the applicant's minority status as such"). Contrast this with the Lynn Plan which makes assumptions about the impact a child will have in a classroom based on nothing more than the color of that child's skin.

individualized consideration is not applicable to K-12 racial diversity plans).

5. The Lynn Plan is not calibrated to achieve Lynn's purported interest.

The three judges of the original First Circuit Panel unanimously agreed that the lack of flexibility and lack of individualized consideration were not the only grounds for finding the Lynn Plan unconstitutional. App.81 ("Although we could end our analysis of the Lynn Plan at this point, we think it wise to point out that the Plan has other narrow-tailoring shortcomings").

> [R]acial classifications cannot be used more often than necessary to satisfy the compelling governmental interest that is at stake. The Lynn Plan cannot pass muster in this respect . . . the Lynn Plan is calibrated toward proportional representation rather than critical mass; it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population (depending on the level of school). Thus, because Lynn's overall non-white school-aged population is 58%, an elementary school with a 40% non-white enrollment qualifies as racially isolated even though that school contains a critical mass of both white and nonwhite students.

Panel Opinion, App.81-82 (internal citations omitted).

The Lynn Plan is a proportional representation plan, not a "critical mass" or racial diversity plan. Children are denied assignment even where those assignment requests would have no impact on critical mass. Conversely, assignment requests are granted where they could make the school less racially diverse, if those requests meet the Plan's proportional representation goal. Because the Plan was designed with only racial proportionality in mind, a middle or high school that is 50% minority/non-minority will be defined as racially isolated because it falls outside

of the +/-10% proportional representation goal. This means a minority student would be permitted to transfer into a middle school that is 50% minority/non-minority, thereby moving the school away for 50% minority/non-minority and towards the system's current 62% minority population. App.31 (using Lynn's student population ratio at the time of the *En Banc* argument). Additionally, a transfer request between two schools that are both well above the 20% "critical mass" offered by Lynn as an objective of the Plan would still be rejected even though the assignment would not cause either school to go below the 20% level. As the three judges of the original Panel noted, "the plan is designed to achieve racial balance, not critical mass." App.82, n.10. The Panel gave the following examples:

> [F]or the 2001-02 school year, two of Lynn's elementary schools — Aborn (35%) and Hood (42%) — had minority populations substantially above the 20% necessary to achieve critical mass but below the 43% necessary to qualify as racially balanced. A minority student seeking to transfer from either of these institutions to a racially balanced school normally would be turned down, even though that transfer would not deprive either the transferor or transferee school of critical mass. A white student, on the other hand, would be allowed to make the move. By contrast, Lynn allows all transfers that do not imperil racial balance, even if particular transfers are segregative. For instance, minority students may freely transfer from Lincoln-Thomson (43% minority) to Ford (71% minority), because neither the transferor nor transferee school will be deprived of racial balance (as that term is defined by Lynn).

App.83 (emphasis in original).

This lack of calibration between the function of the Lynn Plan and Lynn's stated objective means that, even

if a court could conclude that the interest sought is compelling, the Plan is not narrowly tailored to achieve it. *Grutter*, 539 U.S. at 333 ("[T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose'" (alteration in original)), *quoting Shaw* v. *Hunt*, 517 U.S. at 908.

6. Lynn failed to exhaust race-neutral alternatives.

As noted by the original Panel, Lynn has failed to exhaust race-neutral alternatives. Alternatives were not rejected based on whether or not they would be effective at disarming stereotypes, they were rejected because they would not maintain racial balance. *Panel Opinion*, App.84 (noting that the reason the available race-neutral alternatives were rejected was because they are not geared towards racial balancing). Lynn's reasoning in rejecting these alternatives demonstrates that the Plan has more to do with creating chromatically correct classrooms in order to qualify for state funding than advancing the purported educational objectives.

In addition to the limited alternatives considered by Lynn, the U.S. Department of Education has prepared a study listing several effective race-neutral alternatives available in the K-12 setting. ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, U.S. Dept. of Ed., February, 2004, http://www.ed.gov/about/offices/list/ocr/raceneutral.html. The Panel also noted the success of Boston in maintaining racial diversity through its new race-neutral assignment process. App.85, *citing*, *Anderson* v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004).

7. Lynn's Plan is unlimited in its duration.

Unlike the three judge majority of the *En Banc* Panel, the three judges of the original Panel correctly applied the requirement that the use of racial classifications must be limited in duration. App.86 ("the Committee has [not]

committed to undertake any manner of periodic review to determine whether ongoing developments might render the use of racial restrictions superfluous").

Because the Plan does not include a process for regular review to determine when its racial restrictions are no longer needed in order for it to achieve the purported educational objectives, what the First Circuit has approved is the perpetual racial balancing of public schools. Under this decision, public schools systems have a free hand to maintain racial balance through mechanically-applied inflexible racial barriers that are limitless in their duration. The intervention of this Court is required to address the applicability of this and the other requirements of narrow tailoring so that this decision does not usher in a new era of young children being turned away at the schoolhouse door because of the color of their skin.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
05-348 SEP 14 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ON BEHALF OF HER MINOR CHILD, ELIZABETH NEUMYER, ET AL.,

Petitioners,

v.

THE LYNN SCHOOL COMMITTEE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX

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Appendix Table Of Contents

APPENDIX A

Opinion of the *En Banc* Panel of the United States Court of Appeals for the First Circuit..... App.1

APPENDIX B

Opinion of the Panel of the United States Court of Appeals for the First Circuit..... App.51

APPENDIX C

Errata Sheet to the Panel's Decision..... App.91

APPENDIX D

November 10, 2004 Order of the First Circuit denying Appellants' Petition for Panel Rehearing App.93

APPENDIX E

November 22, 2004 Order of the First Circuit denying Appellants' Petition for Rehearing on the Corrected Judgment. App.94

APPENDIX F

November 24, 2004 Order of the First Circuit granting Appellees' Petition for En Banc Review..... App.96

APPENDIX G

Decision of the District Court for the District of Massachusetts App.98

STATUTORY ADDENDUM

42 U.S.C. §§1981, 1983, 1985, 1986, 2000d App.221

Massachusetts Racial Imbalance Law App.222

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Boudin, Chief Judge,
Torruella, Selya, Lipez, and Howard, Circuit Judges.

Michael Williams, with whom Robert J. Roughsedge, Chester Darling, and Citizens for the Preservation of Constitutional Rights were on brief, for plaintiffs.

Sharon L. Browne on brief for Pacific Legal Foundation, amicus curiae.

Richard W. Cole, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and John R. Hitt, Assistant Attorney General, were on brief, for state defendants.

James P. Lamanna, Assistant City Solicitor, and John C. Mihos on consolidated brief for municipal defendants.

Edward J. Barshak and Sugarman, Rogers, Barshak & Cohen, P.C. on brief for Asian-American Lawyers Association of Massachusetts, Boston Bar Association, Community Change, Inc., Fair Housing Center of Greater Boston, Jewish Alliance for Law and Social Action, New England Area Conference of the NAACP, and Greater Boston Civil Rights Coalition, amici curiae.

Patricia A. Brannan, Maree Sneed, and Hogan & Hartson, LLP on brief for Council of the Great City Schools, American Association of School Administrators, National Association of Secondary School Principals, National Education Association, National School Boards Association and Public Education Network, amici curiae.

Nathalie F.P. Gilfoyle, General Counsel, Lindsay Childress-Beatty, Deputy General Counsel, David W. Ogden, and Wilmer, Cutler, Pickering, Hale and Dorr, LLP on brief for American Psychological Association, amicus curiae.

Theodore M. Shaw, Director-Counsel, Norman J. Chachkin, and Chin Quang Le on brief for Northshore Branch of the NAACP, NAACP Legal Defense & Educ. Fund, Inc., Lawyers' Comm. for Civil Right of the Boston Bar Association, and various individuals, amici curiae.

Donna Brewer MacKenna and Casner & Edwards, LLP on brief for Lynn Business Education Foundation and Lynn Business Partnership, Inc., amici curiae.

Thomas Miller, Attorney General (Iowa), Eliot Spitzer, Attorney General (New York), Caitlin J. Halligan, Solicitor General (New York), Michelle Aronowitz, Deputy Solicitor General (New York), Natalie R. Williams, Deputy Bureau Chief, and Hilary B. Klein, Assistant Attorney General (New York), G. Steven Rowe, Attorney General (Maine), and Mark L. Shurtleff,

Attorney General (Utah), on brief for States of Iowa, New York, Maine, and Utah, amici curiae.

Thomas J. Henderson, Derek Black, Harris J. Yale, Bernadette McCann Ezring, Samantha G. Fisherman, Virginia Johnson, and Weil, Gotshal & Manges, LLP on brief for Lawyers' Comm. for Civil Rights Under Law, amicus curiae.

David B. Broughel and Day, Berry & Howard, LLP on brief for Mass. Coalition for Equitable Educ., Mass. Teachers Ass'n, Mass. Fed'n of Teachers, Mass. Ass'n of Sch. Superintendents, Metro Council for Educ. Opportunity, Inc., Center for Law and Educ., Citizens for Pub. Sch., Mass. Ass'n of Hispanic Attorneys, League of Women Voters of Mass., Mass. Law Reform Inst., Alliance for High Standards NOT High Stakes, Schott Center for Public and Early Educ., Nat'l Center for Fair & Open Testing, and Progressive Jewish Alliance, amici curiae.

Angelo N. Ancheta on brief for Civil Rights Project at Harvard Univ., amicus curiae.

June 16, 2005

Opinion En Banc

LIPEZ, Circuit Judge. This appeal requires us to review certain features of a voluntary plan designed to achieve the educational benefits of racial diversity in the public schools of Lynn, Massachusetts ("Lynn Plan" or "Plan"). The Plan addresses resource allocation, curricula, and other aspects of the classroom experience. Relevant to this appeal, it also controls school assignments and transfers. Under the Plan, each student is entitled to attend his or her neighborhood school. Students who do not wish to attend their neighborhood school may apply to transfer to another school. Approval of a transfer

depends, in large part, on the requesting student's race and the racial makeup of the transferor and transferee schools.

Parents whose children were denied transfers on race-conscious grounds challenged the transfer provisions of the Lynn Plan, claiming, inter alia, that the provisions violate the Fourteenth Amendment Equal Protection Clause. The district court rejected the parents' challenges and upheld the Plan. A panel of this court reversed, finding that the Plan was not narrowly tailored to the defendants' compelling interest in achieving the benefits of educational diversity. We granted review en banc and now affirm.

Our review of the equal protection challenge is informed by the Supreme Court's recent decisions regarding affirmative action in higher education, Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003). We conclude, based on those cases, that Lynn has a compelling interest in securing the educational benefits of racial diversity. Applying the analytic framework set forth in Grutter and Gratz to the context of a K-12, non-competitive transfer plan, we hold that the Lynn Plan is narrowly tailored to meet this compelling interest.

The plaintiffs assert a number of other claims as well. We do not reach the merits of their facial challenge to the Massachusetts Racial Imbalance Act, which fails for lack of standing. We treat the plaintiffs' federal statutory claims as foreclosed by our equal protection ruling and reject their challenge to the Plan under Article 111 of the Massachusetts Declaration of Rights. Finally, we conclude that the district court properly denied the plaintiffs' motion for recusal.

I. Background

This case comes to us with a rich factual background, described in detail in a series of district court rulings. See Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (Comfort IV); Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001) (Comfort III);

Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253 (D. Mass. 2001) (Comfort II); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000) (Comfort I). We set forth only those facts necessary to put this case into context, drawing upon the largely unchallenged findings of the district court.

A. Lynn Public Schools

Lynn is the ninth-largest city in Massachusetts, with a population of approximately 89,000. At all relevant times, its school system has been neighborhood-centered, entitling students to attend their local schools as a matter of right. By the mid-1970s, several of Lynn's schools were experiencing significant racial imbalance. In 1977, for example, the Washington Community Elementary School had a nonwhite student population of 57%, more than six times the nonwhite percentage in the school system as a whole. Predominantly nonwhite schools suffered disproportionately from resource shortages, overcrowding, discipline problems, and teacher apathy. The school system was plagued by high absentee rates, racial tension, and low test scores.

In an effort to combat these problems, Lynn established its first magnet school in 1979. At the same time, it inaugurated a voluntary transfer program aimed at attracting white students to that school (which apparently was located in a predominantly nonwhite area of the city). The magnet school was only modestly successful in alleviating racial imbalance.

In the meantime, Lynn was undergoing a demographic shift. Between 1980 and 2000, the city went from being 93% white to 63% white, with the school-age population becoming more than half nonwhite by 2000. Residential segregation by race increased during this period as whites clustered in the northern and western areas of Lynn and nonwhites concentrated in its south-central region.

Because of the neighborhood school system, these residential patterns heightened the racial imbalance of

Lynn's schools. By 1987, seven of eighteen elementary schools had white enrollments of 90% or more, while four others had predominantly nonwhite student bodies. Lynn responded by developing a plan to launch ten magnet schools,[1] but city leaders did not believe that the magnet program, on its own, would effectively combat the growing racial imbalance. In September 1989, the Lynn School Committee ("Lynn") adopted the Plan that is the subject of this litigation.[2]

B. The Lynn Plan

The defendants describe the Lynn Plan as a voluntary plan for school improvement and the elimination of minority isolation. The Plan begins with the premise that every child is entitled to attend his or her neighborhood school. Race is taken into account only when a student seeks to transfer to a school other than his or her neighborhood school.

Lynn operates eighteen elementary schools (six of which are magnets), four middle schools (three of which have magnet programs), and three high schools.[3] In the 2001-02 school year, 15,444 students were enrolled in the Lynn public schools. Out of this group, approximately 42% of students were white, 15% African-American, 29% Hispanic, and 14% Asian (for a total "minority" or nonwhite population of roughly 58%).

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[1]Ordinarily, the label "magnet school" describes an elite public school with a competitive admissions policy. Lynn's magnet schools, however, do not use a competitive admissions policy. Rather, Lynn uses the term for schools that feature an educational theme beyond the standard curriculum, designed partially to attract cross-neighborhood transfers. Examples of such themes include "Life Science" and "Reading and Writing Literary and Whole Language." Despite this specialization the parties have stipulated that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources[,] and curriculum."

[2]The Plan was amended in 1990 and again in 1999.

[3]Lynn also operates six alternative schools, offering such things as special needs education and vocational training. These schools are not subject to the transfer provisions of the Lynn Plan.

For purposes of the Lynn Plan, schools are placed in one of three categories. A "racially balanced" school is one in which the percentage of nonwhite students falls within a set range of the overall proportion of minorities in Lynn's student population. The range is +/- 15% for elementary schools and +/- 10% for other schools. For example, an elementary school with between 43% and 73% nonwhite students during the 2001-02 school year was considered racially balanced, as was a middle or high school that had a nonwhite enrollment of 48% to 68%. In the 2001-02 school year, nine of Lynn's elementary schools, one of its middle schools, and all three of its high schools were racially balanced.

If a school's nonwhite population falls below the racially balanced range (i.e., if the percentage of nonwhite students in 2001-02 fell below 43% for an elementary school or 48% for a middle or high school), it is "racially isolated." Conversely, a school whose nonwhite population rises above the racially balanced range (i.e., over 73% for an elementary school or 68% for a middle or high school) is considered "racially imbalanced." In 2001-02, five of Lynn's elementary schools and one of its middle schools were classified as racially isolated, while four elementary schools and two middle schools were racially imbalanced.

The transfer policy is straightforward. Space permitting, a student whose neighborhood school is racially balanced may transfer to another racially balanced school without regard to race. Because all three of Lynn's high schools are currently racially balanced, for example, students may transfer freely among them. Students are also permitted to make "desegregative" transfers. That is, a white student may transfer out of a racially isolated school and into a racially imbalanced school (i.e., to a school with a lower percentage of white students), and a nonwhite student may transfer out of a racially imbalanced school and into a racially isolated school (i.e., to a school with a lower percentage of nonwhite students). By contrast, absent certain

exceptions, students may not make "segregative" transfers. A segregative transfer is one that would exacerbate racial imbalance in the sending or receiving school (i.e., a white student may not transfer to a racially isolated school, and a nonwhite student may not transfer to a racially imbalanced school).[4]

A student whose transfer request is denied is entitled to appeal. Roughly half of all appeals are granted. Common grounds for successful appeals are medical and safety concerns, daycare issues, and other types of hardship. Appeals will also be granted when the denial would result in siblings attending different schools. The Plan is implemented by the Parent Information Center ("PIC"), which processes all admissions and transfers, works with parents on appeals, and monitors enrollment and racial composition of individual schools and the district in general.

As the plaintiffs point out, the Lynn Plan can result in unequal treatment based on race. Consider, for example, two children, one white and one African-American, who are initially assigned to the same neighborhood elementary school for the 2001-02 school year. The school is racially isolated (i.e., less than 43% minority). Both children request a transfer to a nearby school that is racially imbalanced (i.e., greater than 73% minority). Under the Plan, the white student will be permitted to transfer, and the African-American student will not.

Although the race-conscious transfer policy is the focus of this appeal, the Lynn Plan also includes numerous other provisions aimed at improving the quality of all schools in the district. It calls for curricular programs and teacher training designed to foster cross-racial understanding and reduce racial tension. It also implemented a standardized curriculum throughout Lynn's schools; developed performance indicators for

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[4]Any student who qualifies as "multi-racial" is not subject to the race-conscious transfer limits.

schools, programs and students; took measures to improve student attendance; and created business/college partnerships with schools to improve the quality of instruction. Finally, the Plan envisions a construction program to upgrade school facilities and alleviate overcrowding.

All parties agree that Lynn's public schools have improved markedly since the Plan's inception, although they dispute which aspects of the Plan are responsible for this improvement. In any event, students' standardized test scores have increased, absentee levels have decreased, and racial tensions have diminished under the Plan.

C. The Racial Imbalance Act

The Racial Imbalance Act ("RIA"), Mass. Gen. Laws ch. 15, " 1I, 1J, 1K; id. ch. 71, " 37C, 37D, directs the Massachusetts Board of Education to remedy de facto segregation in the public schools throughout the state. See Sch. Comm. of Boston v. Bd. of Educ., 227 N.E.2d 729, 732 (Mass. 1967). The legislature enacted the RIA in response to findings that dramatic levels of racial imbalance in the public schools threatened to harm students' educational opportunities. See id. at 733-34. The RIA has two main effects: it authorizes the Board to fund voluntary efforts to improve racial balance, Mass. Gen. Laws ch. 15, §1I, and it allows the Board to require that school districts adopt integration plans in certain circumstances, id. ch. 71, §37D.

The Lynn school system has received significant state aid under the voluntary provisions of the RIA. These funds have helped pay for new construction and school renovations.[5] Lynn also receives a state stipend of $500

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[5]Before 2001, the RIA provided reimbursement for school construction and renovations undertaken for the purpose of reducing racial imbalance. The law has been amended to change this funding structure, but that amendment applies prospectively and does not affect Lynn's state funding.

for each desegregative student transfer, and the state defrays certain costs associated with cross-neighborhood transportation and the creation of magnet schools.

D. Procedural History

In 1999, the parents of children who had been denied transfers under the Lynn Plan ("Comfort plaintiffs") brought a civil action against the Lynn School Committee, its individual members, and several governmental officials. They claimed that the Lynn Plan and the RIA violate the Fourteenth Amendment Equal Protection Clause, several federal civil rights statutes, and Article 111 of the Massachusetts Declaration of Rights. The Commonwealth intervened as a party defendant for the limited purpose of defending the RIA. See 28 U.S.C. §2403(b). The district court denied a motion to preliminarily enjoin the race-conscious aspects of the Lynn Plan, see Comfort I, 100 F. Supp. 2d at 59-60, and dismissed several of the plaintiffs' claims, see Comfort III, 150 F. Supp. 2d at 289, 296-97, 302; Comfort II, 131 F. Supp. 2d at 254, 256. Only one of the original Comfort plaintiffs remains in the case. Other parents ("Bollen plaintiffs") then filed a second action that included the Comfort plaintiffs' claims, as well as other statutory claims. The Bollen plaintiffs also added as defendants the members of the Board of Education in their official capacities. The district court consolidated the two cases.

Following an eleven-day bench trial, the district court issued a lengthy opinion dismissing a number of the Bollen plaintiffs' claims on standing grounds. Comfort IV, 283 F. Supp. 2d at 361-63. It rejected the facial attack on the RIA, id. at 366-68, and determined that the Plan's transfer provisions are narrowly tailored to several compelling state interests, and thus constitutional. Id. at 375-92. The court also rejected the plaintiffs' remaining federal statutory claims, treating the statutory provisions as co-extensive with the Equal Protection Clause. Id. at 392-93. Finally, the court held that the transfer